

Brooks Brothers, Inc. and Sally Osborne Smith, Petitioner and Local 340, Amalgamated Clothing & Textile Workers Union, AFL-CIO. Case 34-RD-176

January 30, 1995

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND COHEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held September 3, 1992, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 11 for and 10 against the Union. There were no challenged ballots. Two ballots were declared void. The void ballots are sufficient to affect the results.

The Board has reviewed the record in light of the exceptions¹ and makes the following findings:

The Petitioner's Objection 2 contends that one ballot (a reduced copy of which is attached to this decision) was improperly declared void and should have been counted as a "no" vote.² The ballot shows what appears to be an "X" marked in pencil in the "yes" box scratched over with additional pencil markings. A clear "X" appears in the "no" box. The Regional Director found that this ballot was appropriately declared void. He noted that the ballot included instructions to voters, i.e., "MARK AN 'X' IN THE SQUARE OF YOUR CHOICE" and "If you spoil your ballot, return it to the Board Agent for a new one." The Regional Director further found that the disputed ballot was marked in pencil and that erasers were provided in the voting booth. Citing other Board cases where ballots with markings in both boxes were declared in-

valid, the Regional Director concluded that the meaning of the ballot at issue in this case is ambiguous.³ The Petitioner disputes this conclusion, arguing that the ballot is clearly marked as a "no" vote. We find merit in the Petitioner's position.

As the Regional Director pointed out, the Board's longstanding policy is to give effect to voter intent whenever possible. *Hydro Conduit Corp.*, 260 NLRB 1352 (1982). Thus the Board will count a ballot where, despite an irregularity in the manner in which it has been marked, it clearly expresses the voter's intent. See, e.g., *Columbia Textile Services*, 293 NLRB 1034 (1989). In the present case, the voter effectively and clearly obliterated the "X" in the "yes" box by scratching over it with additional pencil markings, leaving an unmistakable "X" in the "no" box. We find that, unlike the cases relied on by the Regional Director, this ballot clearly expresses the voter's intent to cast a vote against the Union. Accordingly, we find the ballot valid. See *Abtex Beverage Corp.*, 237 NLRB 1271 (1978).⁴ Inasmuch as the revised tally of ballots shows that the Union has not received a majority of the valid votes cast in the election, we find that a certification of results of election should be issued.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Local 340, Amalgamated Clothing & Textile Workers Union, AFL-CIO, and that it is not the exclusive representative of these bargaining unit employees.

³ See *San Joaquin Compress & Warehouse Co.*, 251 NLRB 23 (1980); *Leonard Creations of California*, 243 NLRB 832 (1979); *Caribe Industrial & Electrical Supply*, 216 NLRB 168 (1975); *Mercy College*, 212 NLRB 925 (1974).

⁴ In view of our finding that the ballot provides a clear indication of the voter's intent, we find it unnecessary to consider that alternative courses of action were available to the voter, i.e., erasing the initial mark with the erasers provided or returning the ballot to the Board agent for a new one. We also find it unnecessary to pass on the continuing validity of *Mercy College*, supra, in which the Board found that the shading added to one side of the ballot was inadequate to show that an attempt to obliterate that choice had occurred.

¹ In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to overrule Petitioner's Objection 1.

² The other ballot declared void was not marked in either box and the word "abstain" was written on it. No party has contended that this ballot is valid.